South Carolina Law Review

Volume 34 | Issue 1 Article 5

Fall 8-1-1982

Business and Insurance Law

Patrick J. Frawley

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

Part of the Law Commons

Recommended Citation

Patrick J. Frawley, Business and Insurance Law, 34 S. C. L. Rev. 19 (1982).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

BUSINESS AND INSURANCE LAW

I. CORPORATIONS

A. *Notice of Dissolution*

In *Bonsall v. Piggly Wiggly Helms, Inc.*,[1] the South Carolina Supreme Court held that for the purposes of a corporate dissolution, a potential tort claimant constituted a "known creditor" under Section 33-21-60(b) of the South Carolina Code.[2] The effect of this ruling is to require a corporation to mail notice of intent to dissolve to potential claimants before it can effect a voluntary corporate dissolution.[3] If notice is not mailed, the dissolution will be inoperative against the rights of such claimants and the two-year statute of limitations for actions against dissolved corporations[4] will not bar an action by tort claimants against the corporation.[5] This holding may help vindicate the rights of a tort victim, but may also place a heavy burden on a corporation seeking to wind up its affairs prior to dissolution.

In February 1973, the plaintiff allegedly slipped on a foreign substance while shopping in the defendant's grocery store. After returning home, the plaintiff telephoned the store to report the accident and was told to go to the hospital for treatment. Several weeks later, the defendant's insurer contacted the plaintiff and discussed the accident with her. In June 1973, the plaintiff employed counsel and her attorney subsequently had several conversations about the accident with the defendant's insurer.[6]

On February 20, 1976, the defendant corporation filed notice of intent to dissolve with the Secretary of State of South Carolina. The defendant published notice of its intent in a local newspaper for seven days and on May 13, 1976, filed articles of

---

1. 275 S.C. 593, 274 S.E.2d 298 (1981).
2. S.C. CODE ANN. § 33-21-60(b)(1976).
3. 275 S.C. at 596, 274 S.E.2d at 299.
4. S.C. CODE ANN. § 33-21-220 (1976).
5. 275 S.C. at 596, 274 S.E.2d at 299.
6. Brief for Appellant at 4.

Published by Scholar Commons, 2020

South Carolina Law Review, Vol. 34, Iss. 1 [2020], Art. 5

dissolution with the Secretary of State.[7] The plaintiff brought an action for damages on February 20, 1979, almost three years after dissolution, and almost six years after the cause of action arose.[8] The defendant made a special appearance to quash service, claiming that the action was barred by the special two-year statute of limitations for actions against dissolved corporations.[9] In response, the plaintiff argued that she was a "known creditor" under section 33-21-60(b)[10] and was entitled to mailed notice of the defendant's intent to dissolve. She contended that because she did not receive mailed notice the corporation was not dissolved with respect to her rights, and the two-year statute of limitations was, therefore, inapplicable.[11] The trial court agreed with the plaintiff and held that she was a "known creditor" under the statute and entitled to mailed notice of the defendant's intent to dissolve. The defendant appealed and the supreme court affirmed.[12]

In holding that the plaintiff was a "known creditor" under section 33-21-60(b), the supreme court reasoned that the plaintiff "was known as a claimant to appellant."[13] The court noted that the telephone call to the defendant resulted in an insurance adjuster contacting the plaintiff, and that this gave rise to a reasonable inference that defendant "had notice of [her] fall and

---

7. *Id.* at 4-5.

8. *Id.*

9. S.C. CODE ANN. § 33-21-220 (1976). The statute provides:

> The dissolution of a corporation . . . by the filing by the Secretary of State of the articles of dissolution . . . shall not take away or impair any remedy available to or against such corporation . . . for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution.

Id.

10. S.C. CODE ANN. § 33-21-60 (1976). The statute provides:

> After the filing by the Secretary of State of a statement of intent to dissolve . . . (b) The corporation shall immediately cause notice of the filing of the statement of intent to dissolve to be mailed to each known creditor of the corporation. . . . It shall also publish such notice in a newspaper published or having general circulation in the county in which the registered office of the corporation was located at the time of filing of the statement of intent to dissolve.

Id.

11. Brief for Respondent at 4.

12. 275 S.C. at 596, 274 S.E.2d at 299.

13. *Id.*

her resulting claim for damages."[14] The court found support for its holding that the plaintiff was a creditor in *Stewart v. Walterboro and Western Ry.*[15] In *Stewart*, the South Carolina Supreme Court had interpreted the term "creditor" in the context of a corporate merger and concluded that it encompassed individuals with claims for damages in tort, even though those claims were contingent at the time of consolidation.[16] In applying *Stewart* to the facts of *Bonsall*, the court found that the distinction between a corporate merger and a corporate dissolution was insignificant, noting that "[b]oth address the viability of actions against corporate entities seeking to end their corporate existence as it existed at the time of the claim."[17] Having concluded that plaintiff was a creditor, the court went on to find that she was a "known creditor" for the purposes of section 33-21-60(b).[18] The supreme court held that because the required notice of intent to dissolve was not mailed to plaintiff, "the corporation was not dissolved insofar as [her] rights were concerned."[19]

The *Bonsall* decision is consistent with the policy behind the notice provisions of South Carolina's corporate dissolution statute. In South Carolina, voluntary dissolution proceedings by corporations do not require judicial sanction.[20] For that reason,

---

14. *Id.*

15. 64 S.C. 92, 41 S.E. 827 (1902). In *Stewart*, the plaintiff's decedent was injured through the negligence of his employer and died in October 1898. Two years later the plaintiff filed a wrongful death action against the employer. As a defense, the defendant contended that it had merged with another company to form a new corporation and the company that caused the death of plaintiff's decedent no longer existed. The plaintiff alleged that she was a creditor of defendant and that her claim was not extinguished by the merger because a statute preserved all rights of creditors. The court held that a claim for damages in tort, although contingent, was sufficient to render the plaintiff a "creditor." *Id.* at 96, 41 S.E. at 828.

16. *Id.* at 96, 41 S.E. at 828. The characterization of a contingent claimant as a creditor is consistent with interpretations of other jurisdictions. For example, the Michigan Legislature defined "creditor" as "a person to whom the corporation is indebted, and any other person who has a claim or right against the corporation, liquidated or unliquidated, matured or unmatured, direct or indirect, *absolute or contingent*, secured or unsecured." MICH. COMP. LAWS ANN. § 450.1841(2)(Supp. 1981)(emphasis added). *See also*, Malaquias v. Novo, 59 Cal. App. 2d 225, 138 P.2d 729 (1943); Furst v. Brady, 375 Ill. 425, 31 N.E.2d 606 (1940); New England Trust Co. v. Spaulding, 310 Mass. 424, 38 N.E.2d 672 (1941); Ford v. Maney's Estate, 251 Mich. 461, 232 N.W. 393 (1930); Merwine v. Mount Pocono Light Improvement Co., 304 Pa. 517, 156 A. 150 (1931).

17. 275 S.C. at 596, 274 S.C. at 299.

18. *Id.*

19. *Id.*

20. 1964 Op. Att'y Gen. 60, No. 1631.

Published by Scholar Commons, 2020

the legislature enacted the notice provisions of section 33-21-60(b) to protect the rights of parties who may be affected by a corporate dissolution.[21] Mailed notice to all known creditors protects their rights and published notice "is for the benefit of creditors who may be unknown or whose mailing address cannot be ascertained."[22] The notice provisions of section 33-21-60(b) both benefit and burden corporations. The provision protects the corporation in the orderly liquidation of its assets and payment of claims.[23] However, because the purpose of the provisions is to protect the rights of parties affected by a corporate dissolution, the provisions are mandatory and require strict compliance. As a result of the court's holding in *Bonsall*,[24] corporations must now keep close and accurate records concerning any situation that may mature into a lawsuit. If parties indicate that they may seek to establish a claim against the corporation, the company must keep a record of the parties' whereabouts for at least four years prior to dissolution proceedings,[25] because these parties would be considered "known creditors" entitled to mailed notice of intent to dissolve. Failure to keep extensive and accurate records may lead to the dissolution being set aside with respect to those creditors not notified.[26]

The South Carolina Supreme Court's interpretation of "known creditors" could place unreasonably burdensome notice requirements on dissolving corporations. For example, many large consumer goods bear unique registration numbers that are recorded when the goods are sold. If the goods are later found

21. *Id.*

22. *Id.*

23. *Id.*

24. 275 S.C. at 596, 274 S.E.2d at 299.

25. Under S.C. CODE ANN. § 15-3-350(5)(1976), the statute of limitations for tort actions is six years. Under S.C. CODE ANN. § 33-21-220 (1976), the period when a corporation is amenable to suit following dissolution is two years. It would be unnecessary to send mailed notice to a claimant whose cause of action accrued five years prior to dissolution, for the normal six year limitation period would run before the special two year limitation. If the cause of action accrued less than four years prior to dissolution, however, the improperly dissolved corporation could conceivably be sued after the running of the special two year limitation.

26. The general rule is that noncompliance with mandatory statutory requirements for corporate dissolution constitutes grounds for setting aside the order of dissolution and a creditor may move to vacate the order. 19 C.J.S. *Corporations* § 1693 (1940). The *Bonsall* decision reiterates South Carolina's acceptance of this principle. 275 S.C. at 596, 274 S.E.2d at 299.

defective, would every consumer-purchaser be a "known creditor" entitled to mailed notice of intent to dissolve? This holding in *Bonsall* arguably suggests that they would.[27] However, the tort claimant in *Bonsall* affirmatively indicated that she was injured and was contemplating legal action and the court expressly relied on this action in concluding that she was "known" as a creditor to the corporation. It seems unlikely that the court would have considered Ms. Bonsall a "known" creditor if she had never contacted defendant after her fall. It is reasonable to interpret *Bonsall* as requiring some indication by potential tort claimants that they are actually considering a suit before they will be deemed a "known creditor" entitled to mailed notice of an intent to dissolve.

Robert Bernstein

B. *Truth-in-Lending Act*

In *U.S. Life Credit Corp. v. James*,[28] the South Carolina Supreme Court held that the plaintiff finance company had not violated the disclosure requirements of the Federal Truth-in-Lending Act[29] in its consumer credit transaction with the defendant debtor.[30] The court found that the language of the security agreement created an interest in proceeds[31] of the defendant

27. The manufacturer of a chattel known to be dangerous is subject to liability for physical harm caused by the use of the chattel. *See* RESTATEMENT (SECOND) OF TORTS § 394 (1965). If the consumer good was registered with the company and the company knew of the defective nature of the chattel, it would know of the possibility of the claim, and the consumer arguably would be a "known creditor" under S.C. CODE ANN. § 36-21-60(b)(1976).

28. 276 S.C. 421, 279 S.E.2d 367 (1981).

29. 15 U.S.C. §§ 1601-1681t (1976). Congress enacted the Truth-in-Lending Act in 1968 "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *Id.* § 1601(a). Both the Act and its accompanying Regulation Z, 12 C.F.R. § 226.8(b)(5)(1976), require disclosure of a description of any security interest "held . . . retained or acquired by the creditor in connection with the extension of credit. . . ." *Id.*, 15 U.S.C. § 1638(a)(10)(1976). The disclosure must be made before credit is extended, but may be made in the contract or other document evidencing indebtedness and signed by the purchaser. 15 U.S.C. § 1638(b)(1976); 12 C.F.R. § 226.8(a)(1976). Regulation Z states that if "after-acquired property will be subject to the security interest . . . this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest." *Id.* § 226.8(b)(5)(1976).

30. 276 S.C. at 425, 279 S.E.2d at 370.

31. "Proceeds" are defined as "whatever is received when collateral or proceeds is

Published by Scholar Commons, 2020

South Carolina Law Review, Vol. 34, Iss. 1 [2020], Art. 5

debtor's collateral rather than in the defendant debtor's after-acquired property.[32] The court therefore rejected the defendant debtor's argument that the plaintiff finance company had violated federal disclosure requirements applicable to after-acquired property.[33] The court's reasoning in this decision is unconvincing and seems intended solely to avoid enforcement of the Truth-in-Lending Act.

The parties in *U.S. Life* entered into a consumer credit transaction. Ms. James signed a promissory note and security agreement granting U.S. Life a security interest in approximately twenty listed household items, as well as "all accessions[34] to, substitutions for, replacements of and proceeds from the described collateral."[35] When Ms. James defaulted, U.S. Life brought this action to enforce its security interest.[36] Ms. James counterclaimed that U.S. Life had violated the Truth-in-Lending Act and accompanying Regulation Z,[37] arguing that the language of the security agreement created an interest in after-acquired property, and that U.S. Life had failed to disclose that state law limited this interest to goods acquired within ten days after the loan transaction.[38]

The magistrate's court found for the plaintiff and the circuit

---

[sic] sold, exchanged, collected or otherwise disposed of." S.C. CODE ANN. § 36-9-306(1)(1976). State law grants the secured party a continuing interest in identifiable proceeds of collateral. S.C. CODE ANN. § 36-9-306(2)(1976). The retention of an interest in proceeds by the secured party in a consumer loan transaction does not trigger the disclosure requirements of the Truth-in-Lending Act because state law imposes no limitations on an interest in proceeds.

32. 276 S.C. at 425, 279 S.E.2d at 370. After-acquired property includes all goods purchased after the loan transaction. Under state law, an interest in a consumer's after-acquired property is limited to those goods purchased within ten days after the loan. S.C. CODE ANN. § 36-9-204(4)(b)(1976). If a secured party claims an interest in the consumer's after-acquired goods, the Act and Regulation Z require disclosure of this limitation. *See supra* note 29.

33. 276 S.C. at 424-25, 279 S.E.2d at 369-70.

34. Accessions are defined as "goods which are installed or affixed to other goods." S.C. CODE ANN. § 36-9-314(1)(1976). State law gives the secured party an unlimited interest in any goods that are accessions. S.C. CODE ANN. § 36-9-314(2)(1976). Because no limitations are placed on the secured party's interest in accessions, the Act and Regulation Z do not require the financer to disclose anything other than that he claims an interest in accessions.

35. 276 S.C. at 422, 279 S.E.2d at 368.

36. *Id.*

37. James also raised this claim alternatively by way of recoupment. *Id.* at 422-23, 279 S.E.2d at 370.

38. 276 S.C. at 422-23, 279 S.E.2d at 368-69.

court affirmed,[39] finding as a matter of law that U.S. Life had not claimed an interest in the consumer's after-acquired property.[40] The South Carolina Supreme Court affirmed the judgment for the plaintiff, agreeing with the circuit court that U.S. Life had taken no interest in after-acquired property.[41] In so ruling, the court read the disputed language in the security agreement as creating an interest in proceeds, not after-acquired property, and construed the substitutions and replacement language as an attempt by U.S. Life to cover those situations in which the debtor otherwise disposes of the collateral.[42] The state law provisions regarding proceeds, rather than after-acquired property, would therefore determine the nature and extent of the security interest claimed by U.S. Life.[43] Since the plaintiff had not claimed an interest in the debtor's after-acquired property, but had merely stated its statutory entitlement to proceeds, the court concluded that there was no violation of the Act's disclosure requirements.

The court rejected two cases supporting the defendant's argument that the language of the security agreement created an interest in her after-acquired property.[44] In *Johnson v. Safeway Fin. Corp.*,[45] an unreported South Carolina federal district court decision, the court held that a security agreement containing language identical to that at issue in *U.S. Life* created an interest in the debtor's after-acquired property and that the finance company had therefore violated the disclosure provisions of the Truth-in-Lending Act and Regulation Z.[46] In *Tinsman v. Moline*

39. Record at 1.

40. *Id.* at 17. The circuit court also held that the defendant's claim was barred by the one year statute of limitations, found at 15 U.S.C. § 1640(e)(1976), which provides that "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of occurrence of the violation." Record at 13-14.

41. 276 S.C. at 425, 279 S.E.2d at 370. The court also reaffirmed its holding in Tuloka Affiliates v. Moore, 275 S.C. 199, 268 S.E.2d 293 (1980), by holding that Truth-in-Lending Act claims were not barred by the Act's statute of limitations when raised as an affirmative defense by way of recoupment. 276 S.C. at 424, 279 S.E.2d at 369.

42. 276 S.C. at 425, 279 S.E.2d at 370.

43. *Id.* The state law regarding proceeds provides, without limitation, that the security interest in collateral continues "notwithstanding sale, exchange or other disposition thereof by the debtor." S.C. CODE ANN. § 36-9-306(2)(1976).

44. 276 S.C. at 424-25, 279 S.E.2d at 369-70.

45. No. 78-284 (D.S.C. July 27, 1979).

46. *Id.*, slip op. at 5. The district court noted that the threshold issue was a question

Published by Scholar Commons, 2020

Beneficial Finance Co.,[47] a Seventh Circuit case, the federal court considered a security agreement containing language analogous to that at issue in *U.S. Life*. In *Tinsman*, however, the court rejected the theory that an interest in proceeds rather than after-acquired property had been created, noting that " 'replacement' is not synonymous with 'proceeds'. . . . Replacement goods may be financed from sources other than proceeds. Yet all replacements would be covered by the [finance company's] security arrangement, regardless of whether they were purchased within the ten day limitation."[48] Since the security agreement had created an interest in after-acquired property, the court concluded that the creditor had violated the Truth-in-Lending Act by failing to disclose the ten day limitation on after-acquired goods.[49] The South Carolina Supreme Court, however, refused to follow the reasoning of these two federal court decisions, noting that neither was binding on the court, and both could be distinguished from *U.S. Life* on the facts.[50]

The proceeds theory used by the South Carolina Supreme Court in *U.S. Life* does not take into account the realities of consumer behavior. The vast majority of replacements and substitutions of worn out consumer goods will be financed, not through the sale or exchange of the old goods, but through buying "on time" from the seller or borrowing from a finance company.[51] The party financing the replacement item will then take back a security interest in it. The *U.S. Life* decision indicates

---

of definition, and found that while the agreement did not cover all after-acquired consumer goods, it went beyond the permissible limits of accessions and proceeds by including replacements and substitutions. *Id.* slip op. at 3-5. *See also* Carr v. Blazer Fin. Serv., 598 F.2d 1368 (5th Cir. 1979).

47. 531 F.2d 815 (7th Cir. 1976).

48. *Id.* at 818.

49. *Id.* at 819. Other courts have held that use of the term "replacements" in a security agreement creates an interest in after-acquired property, thereby triggering the federal disclosure requirements. *See, e.g.*, Sneed v. Beneficial Fin. Co., 410 F. Supp. 1135 (D. Hawaii 1976); Murphy v. Beneficial Fin. Co., 443 F. Supp. 463 (S.D. Ohio 1976); Irvin v. Pub. Fin. Co., 340 So. 2d 811 (Ala. Civ. App. 1976), *cert. denied*, 340 So. 2d 815 (Ala. 1976); Conrad v. Beneficial Fin. Co., 91 Misc. 2d 643, 398 N.Y.S.2d 499 (1977). Another frequently litigated phrase is "all other goods of the same class/character now or hereafter acquired." *See, e.g.*, Wilson v. Allied Loans, Inc., 448 F. Supp. 1020 (D.S.C. 1978); Jones v. Allied Loans, Inc., 447 F. Supp. 1121 (D.S.C. 1977).

50. 276 S.C. at 425, 279 S.E.2d at 370.

51. *See* 12 WM. & MARY L. REV. 750 (1971) for a discussion of the priority problem created by the *U.S. Life* analysis.

that the original secured party's interest continues in the new item concurrently with the present financer's security interest in the same item.[52] The resolution of the priority conflict should one or both secured parties assert its interest is unclear.[53] If the court were to resolve the conflict in favor of the original secured party, finance companies would be reluctant to loan money to consumers who had previously dealt with other finance companies because of the substantial risk that the collateral would be interpreted as simply a replacement or substitution for an item securing a previous loan. If the court were to find in favor of the second secured party, then it must acknowledge the implausibility of equating replacements and substitutions with proceeds.[54]

This portion of the decision highlights the ambiguity of the phrase "all accessions to, substitutions for, replacements of and proceeds from the described collateral." Other courts have found the use of the term "replacements" to be misleading in a consumer loan agreement in violation of the Truth-in-Lending Act.[55] By condoning the unexplained use of such language in consumer credit transactions, the South Carolina Supreme Court has subverted the underlying policy of the Act to protect the consumer from "an uninformed use of credit."[56]

The South Carolina Supreme Court also apparently read requirements into the Act that are simply not there. The court suggests in *U.S. Life* that the debtor must allege that the credi-

52. S.C. CODE ANN. § 36-9-107 (1976) gives a purchase money security interest to the financer of the good, whether he is the seller or a third party.

53. S.C. CODE ANN. § 36-9-312 (1976) provides:

> A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected as the time the debtor receives possession of the collateral or within ten days thereafter.

54. Proceeds are more appropriately considered in inventory financing situations where profits from goods sold remain identifiable in accounts-received records to clearly constitute a continuing security interest. *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 1041 n.23 (2d ed. 1980). In the individual consumer situation, however, it is unlikely that the profits from the sale of a second hand item would be identifiably applicable to the purchase of a replacement good. It is therefore ambiguous to equate replacements with proceeds in the context of a consumer credit transaction.

55. *See, e.g.*, Woods v. Beneficial Fin. Co., 395 F. Supp. 9, 14 (D. Or. 1975); Conrad v. Beneficial Fin. Co., 91 Misc. 2d 643, 647, 398 N.Y.S.2d 499, 502 (1977).

56. 15 U.S.C. § 1601(a)(1976). For an article reaching the opposite conclusion, *see* 43 TENN. L. REV. 697 (1976).

tor has asserted a claim to after-acquired property, or that she has been misled or damaged by the creditor's failure to disclose.[57] The injury which the Act seeks to remedy, however, is the creditor's failure to disclose. This omission deprives the borrower of the opportunity to make a meaningful choice, since financial injury need not be alleged to prove a violation of the Truth-in-Lending Act.[58]

In equating replacements and substitutions with proceeds, the South Carolina Supreme Court disregarded the realities of consumer transactions, and created a priority conflict that is not resolved by state law. The decision in *U.S. Life* also undermines the policies behind the Truth-in-Lending Act by failing to afford consumers protection from ambiguous consumer credit arrangements.

Susan Donnelly

II. INSURANCE LAW

A. *Tortious Breach of Duty of Good Faith and Fair Dealing*

The United States District Court for the District of South Carolina dealt with an insurance law cause of action not yet recognized by South Carolina courts in *Wilkie v. Home Security Life Insurance Co.*[59] Although an earlier district court decision had recognized a cause of action for tortious breach of an insurer's duty of good faith and fair dealing in a liability insurance dispute,[60] the court in *Wilkie* refused to extend that decision to a case involving disability insurance. By so refusing, the court implied that liability insurers are to be held to a higher standard of good faith and fair dealing with respect to an insured than nonliability insurers.

In *Wilkie*, a disability insurance policy was in effect for

57. 276 S.C. at 425, 279 S.E.2d at 370.

58. *See, e.g.*, Dzadovsky v. Lyons Ford Sales, 593 F.2d 538 (3rd Cir. 1979). The court in *Dzadovsky* stated: "We are unable to accept this rationale because it suggests the requirement of financial loss before a consumer may bring an action. It is clear, however, that such injury need not be alleged. . . . Any proven violation of the disclosure requirements of the Act is presumed to injure a borrower. . . ." *Id.* at 539.

59. 514 F. Supp. 896 (D.S.C. 1981).

60. Robertson v. State Farm Mut. Auto Ins., 464 F. Supp. 876 (D.S.C. 1979).

James A. Wilkie when he suffered a stroke in February 1979.[61] Wilkie filed a disability claim with the insurer, Home Security Life Insurance Company, in March 1979.[62] Home Security made one payment to Wilkie, but later denied coverage and demanded that the initial payment be returned.[63] Wilkie responded by bringing a diversity suit against the insurer in federal court, alleging two causes of action.[64] The first cause of action was for breach of contract, asserting Wilkie's right to monthly payments under the policy.[65] The second cause of action was for tortious breach of Home Security's duty of good faith and fair dealing.[66] Home Security moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure[67] to dismiss the second cause of action on the grounds that this action had not been, and would not likely be, recognized by South Carolina courts. The district court granted the motion and dismissed the case since the amount in controversy in Wilkie's contract cause of action was less than the court's jurisdictional requirement.[68]

Wilkie relied on a recent South Carolina district court opinion, *Robertson v. State Farm Mutual Auto Insurance Co.*,[69] in which the court held that South Carolina would recognize a cause of action for bad faith refusal by a liability insurer to pay first-party insurance benefits.[70] After stating that it was not bound by the *Robertson* decision, the court in *Wilkie* proceeded to distinguish *Robertson.*[71] The court stated that the claim in *Robertson* involved personal injury protection coverage, which was mandatory under section 56-11-110 of the South Carolina Code, whereas coverage in *Wilkie* was not mandatory, but based upon a voluntary contract between Wilkie and Home Security.[72] Further, the court viewed *Robertson* as protecting private rights created by an act of the General Assembly. The *Wilkie* court

61. 514 F. Supp. at 897.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. FED. R. CIV. P. 12(b)(6).
68. 514 F. Supp. at 897.
69. 464 F. Supp. 876 (D.S.C. 1979).
70. *Id.* at 883.
71. 514 F. Supp. at 898.
72. *Id.*

Published by Scholar Commons, 2020

concluded that extending the *Robertson* holding to *Wilkie* would create a new right.[73]

The district court found that when urged to create new rights, the South Carolina Supreme Court had traditionally declined, finding such action to be a legislative function.[74] The court then cited section 38-9-320 of the South Carolina Code,[75] which allows a plaintiff to recover attorney's fees when denial of an insurance claim is made in bad faith, and commented that, if the legislature had intended to extend the plaintiff's rights further, it could have expressly done so.[76] The court in *Wilkie* concluded that the South Carolina Supreme Court, based on past practice, would likely leave the creation of a new cause of action to the General Assembly.[77]

Wilkie also sought to extend the doctrine developed by the South Carolina Supreme Court in *Tiger River Pine Co. v. Maryland Casualty Co.*[78] to his own claim. The *Tiger River* doctrine allows an insured to bring a tort action against an insurer where the insurer has reserved the right to litigate or settle on behalf of the insured and through negligence or bad faith has subjected the insured to liability in excess of policy limits.[79] The *Wilkie* court drew a distinction between an insurer's duty toward an insured in a liability policy context and in a nonliability policy context.[80] The district court, citing two Oregon cases[81] pointed out that under a liability insurance policy, the insured is subject to the imposition of liability in excess of policy limits should the insurer choose to litigate rather than settle within the policy limits.[82] Consequently, courts "have held insurers to a high duty of good faith and fair dealing when conducting settlement nego-

---

73. *Id.*

74. *Id.* at 898-99 (citing Smith v. Holt, Rinehart and Winston, Inc., 270 S.C. 446, 242 S.E.2d 548 (1978); Page v. Winter, 240 S.C. 516, 126 S.E.2d 570 (1962)).

75. S.C. Code Ann. § 38-9-320 (1976).

76. 514 F. Supp. at 899.

77. *Id.*

78. 163 S.C. 229, 161 S.E. 491 (1931).

79. *Id.* at 232-35, 161 S.E. at 492-94. Plaintiff in *Tiger River* subsequently received damages in the amount of the excess of the judgment over the policy limits plus interest and costs. Tiger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933).

80. 514 F. Supp. at 899-900.

81. Farris v. United States Fidelity & Guar., 284 Or. 453, 587 P.2d 1015 (1978); Santilli v. State Farm Ins. Co., 278 Or. 53, 562 P.2d 965 (1977).

82. 514 F. Supp. at 900.

tiations on behalf of their insured."[83] A nonliability policy, however, does not subject the insured to excess liability, nor does it require him to relinquish his right to control litigation that may arise under the policy.[84]

The district court's opinion in *Wilkie* is difficult to fault. The Oregon cases cited by the court are persuasive, and Wilkie's supporting cases, *Robertson* and *Tiger River*, are both distinguishable. Moreover, there is no indication in *Wilkie* of a gross breach of good faith and fair dealing by Home Security. Were there such misconduct, it would seem inequitable to distinguish between liability and nonliability policyholders in imposing liability upon insurers.[85]

It should be noted that the distinction between liability and nonliability policies adopted by the court in *Wilkie* is not without its critics. In *Gruenberg v. Aetna Insurance Co.*,[86] the California Supreme Court stated that both liability and nonliability policies involve "the duty of an insurer to act in good faith and fairly in handling the claim of an insured, namely a duty not to withhold unreasonably payments due under a policy. There are merely two different aspects of the one duty."[87] This distinction is diminished further in *Fletcher v. Western National Life Insurance Co.*,[88] in which an insurer was held liable in tort for damages caused by its refusal to indemnify the insured under a disability policy. The California Court of Appeals reasoned in *Fletcher* that, just as the duty of good faith and fair dealing for a liability policy insurer dictates that it act reasonably to settle claims by a third person against the insured, so also "the implied-in-law duty of good faith and fair dealing imposes upon a

83. *Id.* (quoting *Santilli*, 278 Or. at 62, 562 P.2d at 969).

84. 514 F. Supp. at 900.

85. In Silberg v. California Life Insurance Company, 11 Cal.3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103 (1974), the insured severely injured his foot in a work-related accident, requiring extensive and repeated hospitalization. The medical insurance carrier delayed payment of hospital bills while it sought various means of avoiding payment altogether, forcing the insured to seek treatment from a number of different hospitals and surgeons because of his unpaid medical bills. He eventually lost his business and suffered two nervous breakdowns. *Id.* at 454-56, 113 Cal. Rptr. at 713-16, 521 P.2d at 1106-08. Such a case of obvious insurer bad faith warrants consumer protection beyond the standard action in contract and recovery of attorneys' fees.

86. 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973).

87. *Id.* at 574, 108 Cal. Rptr. at 487, 510 P.2d at 93.

88. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

Published by Scholar Commons, 2020

South Carolina Law Review, Vol. 34, Iss. 1 [2020], Art. 5

disability insurer a duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause. . . ."[89] As these opinions indicate, not all courts will be willing to rely on the liability-nonliability distinction to deny or impose liability. Some courts will choose to apply the same standard to both types of insurers and find a breach of duty where the insurer's actions are especially culpable.

In *Wilkie*, the United States District Court for the District of South Carolina refused to recognize a cause of action for tortious breach of good faith and fair dealing by an insurer based on the distinction between the duty of good faith of a liability insurer and that of a nonliability insurer, and on its conclusion that the South Carolina Supreme Court would leave the creation of a new cause of action to the General Assembly. In the absence of legislation or a contrary decision by the South Carolina Supreme Court, a nonliability policy holder remains without a tort action for breach of good faith and fair dealing by an insurer.

Patrick J. Frawley

B. *Recovery of Punitive Damages for Breach of a Contract Implied in Law*

In *Piedmont Premium Service, Inc. v. South Carolina Insurance Co.*,[90] the South Carolina Supreme Court upheld the affirmative duty of an insurer to return unearned premiums to an insurance premium service company under section 38-27-100(e) of the South Carolina Code.[91] By holding that a refusal to do so would support a cause of action for breach of contract, the court may also have created the right to recover punitive damages in such an action.

The plaintiff in *Piedmont Premium* was an insurance premium service company[92] engaged in premium financing for auto-

---

89. *Id.* at 401, 89 Cal. Rptr. at 93.

90. ___ S.C. ___, 283 S.E.2d 828 (1981).

91. S.C. CODE ANN. § 38-27-100(e)(1976) provides that "[w]henever an insurance contract is cancelled the insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company which financed the premium for the account of the insured."

92. Under S.C. CODE ANN. § 38-27-10(a)(1976), " 'insurance premium service company' means a person engaged in the business of entering into insurance premium service agreements." S.C. CODE ANN. § 38-27-10(b) defines a premium servicing agreement as

mobile insurance on behalf of customers of Southern Surety of Greenwood, a "designated agent" of the defendant insurance company.[93] The plaintiff paid the premiums directly to Southern Surety,[94] which was to forward the money to the defendant so a policy could be issued. Southern Surety, however, converted the payments to its own use.[95] This scheme was discovered when the plaintiff cancelled certain insurance policies of its customers and attempted to collect the unearned premiums from the defendant.[96] Because it had not received any premiums, the defendant asserted that there were no such policies in effect, and refused the plaintiff's demand for return of premiums.

The plaintiff sued, alleging that South Carolina Insurance had wrongfully refused to return the unearned premiums, and that such breach of contract was accompanied by misrepresentations which amounted to a fraudulent act.[97] At trial, the jury awarded the plaintiff both actual and punitive damages.[98] On appeal, the South Carolina Supreme Court affirmed the award of actual damages, and reversed the award of punitive damages.[99]

The court recognized the common law rule that a party

"an agreement by which an insured . . . promises to pay to a premium service company the amount advanced . . . under the agreement to an insurer or to an insurance agent . . . in payment of premiums on an insurance contract together with a service charge. . . ." Thus, an insurance premium service company is similar to an ordinary lender. When the insured's premium is due, the premium service company makes the payment to the insurance company. The insured then repays this amount, with a service charge, to the premium service company at fixed intervals.

93. ___ S.C. at ___, 283 S.E.2d at 829. The Chief Insurance Commissioner of the State of South Carolina has the power to survey areas of the state to determine whether there is sufficient access to automobile insurance in that area. If he finds that there are insufficient marketing outlets for automobile insurance in that area, he may, after consultation with the facility, designate one or more insurers to service the area. S.C. CODE ANN. § 38-37-150 (1976 & Supp. 1981).

94. The agency agreement between the defendant and Southern Surety authorized Southern Surety to "collect, receive, and receipt for premiums on such insurance tendered by the agent." Brief for Respondent at 11.

95. These conversions took several forms. In some cases, the funds were converted outright. In others, inflated premium prices were quoted to Piedmont Premium, after which Southern Surety kept some or all of the funds. In addition, some fictitious applications were presented to Piedmont so that loans could be generated from Piedmont. ___ S.C. at ___, 283 S.E.2d at 828-29.

96. Brief for Respondent at 4. The procedure for collection of unearned premiums is provided for by S.C. CODE ANN. § 38-27-100(e). *See supra* note 91.

97. ___ S.C. at ___, 283 S.E.2d at 828.

98. Brief for Respondent at 4-5.

99. ___ S.C. at ___, 283 S.E.2d at 828.

Published by Scholar Commons, 2020

lacking a contractual relation with an insurer cannot recover unearned premiums paid as a loan to the insured, even if payments are made directly to the insurer's agent.[100] The court, however, found that section 38-27-100(e) created a contract implied in law between the parties.[101] Under that statute, an insurer is required by law to return any unearned premiums to the lender if the lender proves: (1) the existence of a valid premium service agreement; (2) the payment of premiums to an insurer or its agent[102] under the agreement; (3) a default in repayment of the insured; and (4) lender compliance with the other provisions of section 38-27-100. Failure by the insurer to return the unearned premiums after proof of these elements would support an action for breach of contract.[103] After finding that the plain-

---

100. *Id.* at ___, 283 S.E.2d at 829, (citing 44 C.J.S. *Insurance* § 405(b)(1945); 6 COUCH ON INSURANCE 2d § 31:161 (1961)). *See also*, Pioneer Reserve Life Ins. v. Smith, 180 Ark. 428, 21 S.W.2d 968 (1929)(insurer held not liable to one advancing money to applicant for premium, though money was paid directly to insurer's agent); Burns & Reilley Real Estate Co. v. Philadelphia Life Ins., 239 Pa. 22, 86 A. 642 (1913)(right of action for a return of the insurance premiums paid is vested in the customers, not in the brokers). *But see*, Uni-Service Credit Corp. v. Motor Club of Am. Enter., ___ Mass. App. Ct. ___, 404 N.E.2d 1263 (1980).

101. ___ S.C. at ___, 283 S.E.2d at 829. Contracts implied in law are a legal fiction imposed without regard to the intention of the parties. Bloomgarden v. Coyer, 479 F.2d 201 (D.C. Cir. 1973); St. Paul Fire and Marine Ins. v. Indemnity Ins. Co., 32 N.J. 17, 158 A.2d 825 (1960); Hurdis Realty, Inc. v. Town of North Providence, ___ R.I. ___, 397 A.2d 896 (1979). They may arise when a party is under a legal obligation to perform a duty, from which his promise is inferred. Don George, Inc. v. Paramount Pictures, 111 F. Supp. 458 (W.D.La. 1951); Armstrong v. Weiss, 168 Misc. 653, 7 N.Y.S.2d 26 (1938); *See*, First Nat'l Bank of Lincolnwood v. Glenn, 132 Ill. App. 2d 322, 270 N.E.2d 493 (1971); Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 219 A.2d 332 (1966). A lack of privity between the parties involved does not defeat an action in contract implied in law. Paschall's, Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150 (1966); Mill and Logging Supply Co. v. West Tenino Lumber Co., 44 Wash. 2d 102, 265 P.2d 807 (1954).

Under S.C. CODE ANN. § 38-27-100(e)(1976), the defendant had a legal obligation to return the unearned premiums to the plaintiff. From this obligation, the defendant's promise is inferred by law, and lack of privity should not allow the defendant to circumvent its obligation. The court thus properly held that an action under a contract implied in law existed.

102. The acts of an agent acting within the scope of his actual authority are binding upon his principal. Palmer v. Sovereign Camp W.O.W., 197 S.C. 379, 15 S.E.2d 655 (1941); General Motors Acceptance Corp. v. Chestnut, 158 S.C. 42, 155 S.E. 231 (1930); Williams v. Western Union Tel., 138 S.C. 281, 136 S.E. 218 (1927); *See*, Harrison v. Williams, 154 S.C. 407, 151 S.E. 570 (1930); *See also*, RESTATEMENT (SECOND) OF AGENCY § 144 (1958).

103. ___ S.C. at ___, 283 S.E.2d at 829. This gives rise to a wholly separate contract between the insurer and the premium service company. There would therefore be three separate contracts involved in such an action:

tiff had met its burden on the elements, the court concluded that the defendant had breached its duty to return the premiums, and upheld the award of actual damages.[104]

By finding that this statutory obligation would support an action for breach of contract, the court established the possibility for recovery of damages beyond those authorized by section 38-27-100(e). Under the statute, only the unearned premiums paid to the insurer are recoverable.[105] However, the measure of recovery in an action for breach of a contract implied in law is the amount by which the court considers the defendant to have been unjustly enriched at the expense of the plaintiff.[106] Moreover, in South Carolina, an action for breach of contract, under the proper circumstances, may warrant recovery of punitive damages.[107]

The court denied recovery of punitive damages in *Piedmont Premium* because it found no evidence of a fraudulent act accompanying the breach.[108] A willful breach of contract, even with a fraudulent intent, is not sufficient to support a recovery of punitive damages.[109] Although the court did not offer guidance as to what would constitute a fraudulent act justifying recovery of punitive damages in an action for breach of a contract implied in law, it did leave open the possibility of allowing such damages in future actions.

By holding that section 38-27-100(e) gives rise to an action

---

(1) the contract between the insurance company and the individual insureds;
(2) the contract between the premium service company and the individual insureds;
(3) the implied in law contract between the insurance company and the premium service company.

104. ___ S.C. at ___, 283 S.E.2d at 829.

105. S.C. CODE ANN. § 38-27-100(e)(1976).

106. United States Rubber Prod. v. Town of Batesburg, 183 S.C. 49, 190 S.E. 120 (1936).

107. Although, as a general rule, punitive damages are not awarded for breach of contract, D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES 818 (1973), South Carolina courts will allow recovery of punitive damages in such an action if the plaintiff establishes that the breach was accomplished with a fraudulent intention and was accompanied by a fraudulent act. *See* Thompson v. Home Sec. Life Ins., 271 S.C. 54, 244 S.E.2d 533 (1978); *See also*, Note, *Punitive Damages for Breach of Contract in South Carolina*, 10 S.C.L.Q. 444 (1958).

108. Brief for Appellant at 37. Plaintiff alleged as the "willful act of misrepresentation" defendant's denial of coverage to customers of the plaintiff, but plaintiff apparently failed to prove any denial of coverage. *Id.*

109. Lamb v. Metropolitan Mut. Fire Ins., 183 S.C. 345, 191 S.E. 56 (1937).

South Carolina Law Review, Vol. 34, Iss. 1 [2020], Art. 5

in quasi contract, the South Carolina Supreme Court has made it possible to recover punitive damages in proper circumstances. The court, however, properly denied such damages in *Piedmont Premium.*

Robert Bernstein

C. *Workmen's Compensation Subrogation*

Although the South Carolina Supreme Court's recent application of this state's workmen's compensation subrogation statute in *Cockcroft v. Airco Alloys, Inc.*[110] adhered to the letter of the law and followed precedent established eleven years earlier,[111] that decision is contrary to the primary purpose and policy of the statute.[112] The court in *Cockcroft* decided three issues: first, the court found that an administratrix who had been issued letters dismissory lacked standing to bring an action on behalf of her late husband's estate; second, that a probate court *nunc pro tunc* order reinstating her as administratrix subsequent to the commencement of the action did not relate back to give her standing; and third, that a workmen's compensation carrier could not bring the action on its own behalf since the carrier, by failing to meet the notice requirements of the subrogation statute, had not effected a proper assignment of the action.[113] By affirming the lower court's dismissal of the action, the supreme court created a potential snare for unwary employers or workmen's compensation carriers seeking subrogation against third-party tortfeasors.

In May 1977, United States Fidelity and Guaranty Insurance Company (U.S.F.& G.), a workmen's compensation carrier for E. & E. Electric Company, settled a claim with Mrs. Cockcroft, administratrix for her husband's estate.[114] Mr. Cockcroft died allegedly from inhaling furnace emissions while working for E. & E. Electric on the premises of Airco Alloys.[115] After Mrs.

110. 276 S.C. 184, 277 S.E.2d 587 (1981).

111. *See* Glenn v. E. I. DuPont De Nemours & Co., 254 S.C. 128, 174 S.E.2d 155 (1970).

112. A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 71.10 (1952). *See infra* notes 141-143 and accompanying text.

113. 276 S.C. at 188-90, 277 S.E.2d at 587-88.

114. *Id.* at 186, 277 S.E.2d at 588.

115. Record at 4.

Cockcroft had fulfilled her duties, her attorney sought letters dismissory discharging her as administratrix.[116] The court entered letters dismissory and discharged Mrs. Cockcroft on February 13, 1978.[117] One month after the discharge, an attorney for U.S.F.& G. wrote to Mrs. Cockcroft, giving her notice that, unless she commenced an action against Airco Alloys by May 30, 1978, the cause of action would be assigned to U.S.F.& G.[118] When Mrs. Cockcroft failed to bring suit by that date, U.S.F.& G. filed a complaint against Airco Alloys, alleging that Mrs. Cockcroft, in her capacity as administratrix of her husband's estate, was bringing a wrongful death action.[119] Airco Alloys filed no responsive pleadings and on September 21, 1978, an order of default was entered against the defendant.[120]

On March 1, 1979, the defendant appeared specially and moved to dismiss for lack of subject matter jurisdiction, contending that, because Mrs. Cockcroft had been discharged as administratrix before commencement of the action, the plaintiff in the suit was not a legal entity.[121] On March 23, 1979, Mrs. Cockcroft petitioned the probate court to rescind and void, *nunc pro tunc*, the letters dismissory. The probate judge granted the petition and issued a *nunc pro tunc* order[122] on the grounds that the letters had been issued prematurely and were not based on a petition made by Mrs. Cockcroft.[123] In June 1979, the circuit

116. *Id.* at 44.

117. 276 S.C. at 186, 277 S.E.2d at 588.

118. S.C. CODE ANN. § 42-1-560(c)(1976) provides for such an assignment:

If, prior to the expiration of the one-year period referred to in subsection (b), or within thirty days prior to the expiration of the time in which such action may be brought, the injured employee, or, in event of his death, the person entitled to sue therefor shall not have commenced action against or settled with the third party, the right of action of the injured employee, or, in event of his death, the person entitled to sue therefor shall pass by assignment to the carrier; *provided*, that the assignment shall not occur less than twenty days after the carrier has notified the injured employee or, in event of his death, his personal representative or other person entitled to sue therefor in writing, by personal service or by registered or certified mail that failure to commence such action will operate as an assignment of the cause of action to the carrier (emphasis in original).

119. Record at 2-10.

120. 276 S.C. at 187, 277 S.E.2d at 589.

121. Record at 12.

122. 276 S.C. at 187, 277 S.E.2d at 589.

123. Record at 15. An attorney for the firm representing Mrs. Cockcroft had been told by a senior attorney within the firm to close the file and end the bond by getting

South Carolina Law Review, Vol. 34, Iss. 1 [2020], Art. 5

court vacated the default judgment and granted Airco Alloys' motion to dismiss, ruling that Mrs. Cockcroft had been discharged as administratrix before the suit was instituted[124] and that the *nunc pro tunc* order did not reinstate her as administratrix for purposes of the suit.[125] The court also ruled that U.S.F.& G. could not bring the action in its own name under the wrongful death statute[126] and that, even if U.S.F.& G. could bring the action in its own name, it had not complied with the notice provisions of the subrogation statute and therefore had failed to obtain a proper assignment.[127] The plaintiffs appealed the trial court's rulings.

The supreme court, affirming the dismissal, addressed the following two issues: (1) whether Mrs. Cockcroft had capacity to bring suit at the time the complaint was filed; and (2) whether U.S.F.& G. had obtained a proper assignment of the action. The supreme court relied on its decision in *Glenn v. E. I. DuPont De Nemours & Co.*,[128] in holding that Mrs. Cockcroft lacked capacity to bring suit. In *Glenn*, a decedent's widow petitioned for and received her discharge as administratrix. Five years later, she then commenced a wrongful death action against her husband's tortfeasor. The court held that the action was a nullity and that a subsequent probate court order reinstating her, *nunc pro tunc*, did not relate back to make the action valid.[129] Counsel for Mrs. Cockcroft and U.S.F.& G. sought to distinguish *Glenn* on its facts, arguing that while the administratrix in *Glenn* had herself applied for letters dismissory and had waited five years after her discharge to bring suit, Mrs. Cockcroft had not personally sought discharge from her duties and had waited only a few months to bring a wrongful death action and seek reinstatement.[130] The court found the factual distinctions unper-

letters dismissory or doing whatever was necessary. The attorney initiated the necessary proceedings, then phoned Mrs. Cockcroft, who reviewed the final return in the presence of the attorney. Letters dismissory were subsequently entered, but a formal petition for the letters had never been requested or signed by Mrs. Cockcroft. *Id.* at 28-35.

124. *Id.* at 54.

125. *Id.* at 57.

126. *Id.* at 59.

127. *Id.* at 60.

128. 254 S.C. 128, 174 S.E.2d 155 (1970).

129. *Id.*

130. Brief for Appellant at 15.

suasive and adhered to the precedent established in *Glenn*[131]

The supreme court did not reach the question of a carrier's ability under the subrogation statute to bring a wrongful death action in its own name, concluding that even if it could, U.S.F.& G. had failed to obtain proper assignment by not complying with the notice provisions of section 42-1-560 of the South Carolina Code.[132] This section requires a workmen's compensation carrier seeking an assignment to notify the injured employee, or in the event of that person's death, his personal representative or another person entitled to sue that the employee's failure to commence an action will operate as an assignment of his cause of action to the carrier.[133] The court found that U.S.F.& G.'s letter failed to provide the notice required by that statute because Mrs. Cockcroft had been discharged before she received the letter and was therefore no longer the personal representative of her late husband.[134] The court noted that the letter to Mrs. Cockcroft was also insufficient as notice to "another person entitled to sue," because her two children were similarly entitled yet had not received notice.[135] Because the notice given did not meet that statutory requirement, the court concluded that U.S.F.& G. had not obtained proper assignment of the action[136] and that, consequently, neither Mrs. Cockcroft nor U.S.F.&G. had capacity to sue.[137]

Of the five categories of workmen's compensation subroga-

---

131. 276 S.C. at 188, 277 S.E.2d at 589.

132. *Id.*

133. See *supra* note 118 for the text of the relevant portion of S.C. CODE ANN. § 42-1-560 (1976).

134. 276 S.C. at 189, 277 S.E.2d at 590.

135. *Id.* The court noted as justification for the conclusion that the children were "other persons entitled to sue" that the children would be beneficiaries of a wrongful death action. The children are made beneficiaries of such an action by S.C. CODE ANN. § 15-51-20 (1976), which provides in pertinent part that "[e]very [wrongful death] action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused. . . ." Section 15-51-20 further provides, however, that "[e]very such action shall be brought by or in the name of the executor or administrator of [the decedant]." Thus, only Mrs. Cockcroft in her capacity as administratrix would have been entitled to sue under § 15-51-20; neither she nor her children, in their capacity as beneficiaries, would be entitled to sue for wrongful death. It thus seems that notice to the children would not have rendered U.S.F.& G's notice effective, although the court implied that it would. 276 S.C. at 189, 277 S.E.2d at 590.

136. 276 S.C. at 189, 277 S.E.2d at 590.

137. *Id.* at 189-90, 277 S.E.2d at 590.

tion statutes,[138] South Carolina and nineteen other states have "Employee Priority" statutes.[139] This type of subrogation statute gives an employee a defined period of time after the award of workmen's compensation benefits to bring a third party suit. If the employee fails to bring suit, the right of action is assigned to the payor of the employee's compensation, whether a self-insured employer or a carrier.[140] The policies behind these assignments are that the ultimate loss from an injury should fall upon the wrongdoer, rather than upon the insurer,[141] and that the employee should not be entitled to double recovery.[142] To promote the first policy, several courts have held that compensation statutes giving the insurer the right to enforce the liability of a third party should be liberally construed.[143]

Cockcroft, however, does not appear to serve the policy of imposing the ultimate loss on the wrongdoer: the alleged wrongdoer escaped liability through a procedural technicality, and a carrier that had upheld its duty to pay was denied its subrogation rights. Nevertheless, U.S.F.& G. clearly failed to comply with the statutory notice requirements, and short of ignoring the requirements of section 42-1-560(c) altogether, the court could not have more liberally construed the statute. The court might have resolved this dilemma by construing more liberally the facts to which it applied section 42-1-560(c). Had the court been more willing to recognize the factual distinctions between Mrs. Cockcroft's discharge as administratrix and the discharge of the plaintiff in *Glenn*, the policy behind the statute might have been better served.

In short, *Cockcroft* is an anomaly. The court appears to have correctly construed the notice requirements of section 42-1-560 but, in so doing, defeated the policy behind that section. *Cockcroft* should alert employers and workmen's compensation

138. A. LARSON, *supra* note 112, at § 74.10.

139. *Id.* at § 74.14.

140. *Id.*

141. *Id.*, at § 71.10.

142. *Id.*, at § 71.20.

143. *See, e.g.*, Hobart v. O'Brien, 243 F.2d 735 (1st Cir. 1957); State *ex rel.* Indus. Comm'n v. Pressley, 74 Ariz. 412, 250 P.2d 992 (1952); Johnson v. Turner, 319 Ill. App. 265, 49 N.E.2d 297 (1943); Hall v. Pennsylvania Greyhound Lines, 121 Ind. App. 219, 96 N.E.2d 348 (1951); Furlong v. Cronan, 305 Mass. 464, 26 N.E.2d 382 (1940); *In re* Capozzi's Case, 4 Mass. App. Ct. 342, 347 N.E.2d 685 (1976).

carriers seeking compensation under section 42-1-560 of the need to correlate the notice provisions in the statute with the ministerial acts of the probate court and the consequences of failing to do so.

Patrick J. Frawley